



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 62 OF 2019

KENNEDY OTIENO OCHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the Judgment and decision of the Principal Magistrate's Court at Winam

.(Hon. J. MITEY (SRM) dated the 18th October 2019 in Winam PMCCR S.O No. 24 of 2016]

JUDGMENT

The Appellant, **KENNEDY OTIENO OCHIENG**, was convicted for the offence of **Defilement** contrary to **Section 8 (1)** as read with **Section 8 (4)** of the **Sexual Offences Act**. He was then sentenced to 15 Years imprisonment.

1. In his Amended Grounds of Appeal he put forward 4 issues, which can be summarized as follows;

(1) The Court should consider the circumstances surrounding the veracity of the offence.

(2) The Court should consider a reduction of the sentence in accordance with Article 50 (2) (p) of the Constitution.

(3) Pursuant to Section 333 (2) of the Criminal Procedure Code, the Court should take into account the period he spent in custody, during the trial.

(4) The Appellant's Defence and mitigation should be given consideration.

2. The Appellant submitted that the whole case was concocted after he had fallen-out with **PW2**. He explained that he had lived with the witness after her husband had passed away.

3. However, they parted ways after the Appellant concluded that the witness was not loyal to him.

4. The Appellant submitted that there was no clarity about what had transpired; pointing out that there was a possibility that the Complainant was attacked overnight, but there was no evidence that the Appellant's organ made contact with the Complainant's organ.

5. Secondly, the Appellant submitted that there was no positive identification of the person who assaulted the Complainant. He drew attention to the fact that the incident took place at night. In those circumstances, there ought to have been clear evidence about the source of light and its intensity.

6. As far as the Appellant was concerned, the evidence on record did not prove how the assailant was identified.

7. The Appellant also wondered why none of the other persons who were allegedly sleeping in the same room as the Complainant, were not woken up when the door to the house was kicked open.

8. In any event, the Appellant believes that the Complainant must have been in great distress and shock, from the attack. He reasoned that when a person was awoken from sleep, it would normally take a while before the person could be able to identify his or her assailant.

9. The Appellant also noted the prosecution failed to produce some essential witnesses, such as the;

(a) complainant's siblings;

(b) taxi driver;

(c) bar-owner;

(d) watchman; and

(e) boda boda rider (rescuer).

Sentence

10. The Appellant submitted that the mandatory minimum sentence, which was handed down to him, was unconstitutional.

11. He also submitted that the facts placed before the court appeared to show that both parties were under the influence of alcohol or some other drugs.

12. Whilst appreciating that drunkenness did not diminish the Appellant's criminal culpability, the Appellant submitted that it was a relevant factor to consider, as it lowered the degree of blame. He said that the offence seems to have;

“..... occurred in the midst of a seemingly spectacular and perhaps

‘DRUNKEN ORGY’”

Section 333 (2) of C.P.C.

13. The statute imposes an obligation on the court to take into account the period which the offender was held in custody whilst he was still on trial.

Analysis

14. Given the broad range of issues raised by the Appellant, this court will re-evaluate the evidence on record, and will seek to ascertain whether or not there was merit in the concerns raised.

15. **PW1** “**AAO**” is the Complainant. On the material date, she was inside the kitchen of her auntie, “**PAO**”. Her said auntie had young children, who **AAO** was assisting to study.

16. **PW1** used to sleep inside the said kitchen, together with her auntie's 5 children.

17. At about 11p.m, the children were asleep, but the Complainant was not yet asleep.

18. It was her evidence that the Appellant kicked the door open. She explained that the door did not have a lock.

19. **PW1** said that when the Appellant kicked the door open, it made a single noise. That caused her to become frightened. She therefore wanted to scream, but the Appellant told her to stop, or else he would stab her with a knife.

20. The Appellant covered the mouth of **PW1**, using a cloth. He then tied her legs and hands, by passing a rope from the legs upwards over her body.

21. The Appellant then put the Complainant inside a car which was outside the kitchen.

22. The car was driven to a bar in Manyatta. During that time, the Complainant was crying, as she was fearful, having seen the knife which the Appellant was carrying.

23. Inside the bar, the Appellant purchased “*beer*”, by the name “*Legend*”. He told **PW1** to drink the said “*beer*”, if she did not want to die or to be beaten up by him.

24. **PW1** testified that she had no alternative, but to drink the alcohol. After consuming the alcohol, **PW1** was unable to understand what was going on.

25. The following morning **PW1** found herself at some field in Manyatta. She was naked.

26. She was assisted by a boda boda rider, who ferried her home. She was then taken to hospital, at Nyalunya Dispensary.

27. **PW2, PC SAMSON WAMBU**, was the Investigating Officer.
28. He testified that **PW5** accompanied the Complainant when the offence was reported at the Nyamasaria Police Patrol Base.
29. **PW1** reported that she had been defiled by a person well known to her.
30. Later that afternoon, **PW2** received a call, informing the police that members of the public wanted to lynch the suspect, whom they had arrested at the [Particulars Withheld] Area.
31. **PW2** rushed to the scene with PC Wafula and PC Luchana, and they rescued the Appellant.
32. During cross-examination, **PW2** said that although **PW5** had disagreed with the Appellant, the 2 of them were still in talking terms. Indeed, it is the Appellant who persuaded **PW5** to go underground.
33. He was categorical that the Appellant was not framed due to some alleged disagreement with **PW5**. If anything, **PW5** was still living with the Appellant at the time when the offence was committed.
34. **PW3, NELSON LAMECK ALUOCH**, was a Clinical Officer, based at the Gender Based Violence and Recovery Centre at the Jaramogi Oginga Odinga Teaching & Referral Hospital.
35. When the Complainant was examined by him, **PW3** noted that she was clinically stable but irritable because she was in pain.
36. He testified that **PW1** had bruises on the lateral aspect of the thigh, which was suggestive of friction injury from a tight rope.
37. **PW1** had bruises on the vulval wall and a mild tear.
38. The hymen was broken, but remnants could be seen hanging.
39. During cross-examination, **PW3** said;

“I could tell that there was penetration.

.....

The age of the tear was fresh, less than a day at the time of examination.”

40. The defence counsel then asked more questions pertaining to the possible causes of the breakage of the hymen. **PW3** testified thus;

“Hymen can also be broken due to injury like during riding of a bicycle or such vigorous exercise.

Penetration also causes the hymen to break. In this case I ruled out injury. I concluded it was due to penetration.

.....

If there was injury then it would also apply majorly on outer genitalia.

In this case there was no injury on the outer genitalia.”

41. **PW4, DR. ONYANGO STEVE** was a Medical Officer at Jaramogi Oginga Odinga Teaching & Referral Hospital. He worked in the Obstetrics and Gynecology Department. He produced the P3 Form which had been filled by his colleague, Dr. Ogwa. At the time when **PW4** testified, Dr. Ogwa was away in Nairobi, for post-graduate studies.
42. The report showed friction injuries on the Complainant’s thigh, bilaterally, right above the knees.
43. The Complainant had a mild tear of the vulva, near the perineum, (which is the outer part of the vagina towards the anus).
44. **PW4** provided the following explanation;

“Tear to the vulva may be caused by trauma. However, we consider what risks the minor would have been exposed to.

The origin of the tear was from the vagina, so it shows the tear was caused by some object penetrating, thus expanding and enlarging the vulva and causing the tear.”

45. **PW5, "POA"** testified that at 6.30a.m, on 13th December 2016, **PW1** knocked on her door. When **PW5** opened the door, she found **PW1** crying.
46. **PW1** told **PW5** about what the Appellant had done to her.
47. **PW5** noted that the Complainant was tired; and both her clothes and her body had soil, making her look dirty.
48. Her thighs had marks, showing where a rope had been tied.
49. **PW5** escorted **PW1** to Nyalunya Dispensary. After he had examined **PW1**, the doctor told **PW5** that the Complainant had been defiled.
50. **PW5** testified that she had not had any grudges against the Appellant.
51. During cross-examination, **PW5** said that the Appellant had threatened to kill her if she testified in court, and if the court convicted him.
52. As a result of the threats, **PW5** moved away from her home.
53. After **PW5** testified, the Investigating Officer (**PW2**) was recalled, and he produced the Complainant's Birth Certificate. The date of birth was 6th April 1999.
54. The prosecution then closed its case.
55. When the Appellant was put to his defence, he gave a sworn testimony and then called one other witness.
56. **DW1** testified that on the material date, (12th December 2016) he was at home. He was together with his elder wife QA, and their children.
57. He said that he had been at a Crusade at the Kadijo SDA Church. He left the Crusade after 10p.m.
58. Upon arrival, **PW5** confronted him, in the company of 4 men, who told the Appellant that he could not inherit **PW5**, yet she was an in-law to the said 4 men.
59. According to the Appellant, he called the police, because there was tension.
60. Thereafter, **PW5** left and went to [Particulars Withheld]; she later came back with police officers who arrested the Appellant.
61. During cross-examination, the Appellant said **PW5**;
- "..... was my friend, just like a wife, but she was staying in her own compound, not within my compound."***
62. **DW2, Q**, is the first wife of the Appellant.
63. She testified that when **PW5** came to her house, **PW5** accused the Appellant of having defiled her daughter.
64. **PW5** was accompanied by some men, and they threatened to burn down **DW2's** house.
65. The evidence tendered by the Complainant and by the Clinical Officer and the Doctor prove beyond any reasonable doubt that the Complainant was defiled.
66. The Complainant testified that at the time when the Appellant entered into the kitchen where the Complainant was sleeping, there was lighting from the "*Delight*" Solar lamp. The said light enabled the Complainant to see the Appellant clearly.
67. Thereafter, the Appellant carried the Complainant shoulder-high, and placed her on the back seat of the vehicle which the Appellant had hired. He sat next to her, inside the vehicle.
68. When they got to the bar at Manyatta, the Appellant held the hand of the Complainant, as he led her into the said bar. They then sat inside the bar for about 15 minutes.
69. I find that the time taken and the circumstances prevailing enabled the Complainant to positively recognize the Appellant.
70. He deliberately stupefied the Complainant, by compelling her to consume alcohol. Thereafter, when the Complainant regained her senses, she had already been defiled.
71. As it is the Appellant who tied up the Complainant, carried her into a vehicle which drove them to a bar, where he stupefied her, I find that it is the Appellant who was responsible for what befell the Complainant.

72. I find that the defence put forward by the Appellant was a bare denial, which did not cast any doubt on the evidence tendered by the prosecution.

73. Accordingly, the conviction was founded upon solid evidence, which proved all the ingredients of the offence of defilement.

74. Drunkenness was never raised by the Appellant, as a defence. It cannot now be the basis for challenging the decision of the trial court.

75. In any event, the Appellant seems to have properly planned the whole thing, in advance. He hired a vehicle, which he used to ferry the Complainant. Before he carried her away, he tied her up, using a rope. He tied her up with such force, that the rope left marks on the Complainant's body.

76. He then bought alcohol, which he compelled the Complainant to drink.

77. And whilst the Complainant was drinking, the Appellant refrained from drinking.

78. There is no evidence at all that the Appellant committed the offence whilst he was drunk, or because he was drunk.

Sentence

79. After conviction, the Appellant was given an opportunity for mitigation.

80. Thereafter, the learned trial magistrate called for a pre-sentencing report from the Probation Officer.

81. During sentencing, the court took into account both the mitigation and the Probation report. The other factors which the trial court took into account were the nature of the offence and the Sentencing Policy Guide.

82. I find that the Appellant was not simply handed a mandatory sentence.

83. The sentence was not unconstitutional, as alleged by the Appellant.

Section 333 (2) of the

Criminal Procedure Code

84. Pursuant to that statutory provision, the Court is enjoined to take into account the period which an accused person had spent in custody, during the time when he was still on trial.

85. From the record of the proceedings, the Appellant's bond was cancelled on 5th August 2019. He remained in custody until 18th October 2019, when Judgment was delivered.

86. By my calculations, the Appellant was in custody for a total of 74 days prior to his conviction.

87. Save for the consideration under **Section 333 (2)** of the **Criminal Procedure Code**, the appeal lacks merit, and is therefore dismissed.

DATED, SIGNED and DELIVERED at KISUMU

This 30th day of **March** 2022

FRED A. OCHIENG

JUDGE